IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1289 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AFZALKHAN @ BABU MURTUZAKHAN PATHAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1289 of 2004

MR SM ANSARI with MR AZIZ AN ALVI for Appellant

MR ARUN D OZA, PUBLIC PROSECUTOR for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 09/12/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE AKSHAY H.MEHTA)

Admit.

The appellant, in this appeal, which is filed under Sec,34(1)(4) of the Prevention of Terrorism Act, 2002 (for short, 'POTA') has challenged the order passed by the designated Court, POTA, Ahmedabad, dated 24.6.2004 below Criminal Misc.Appln. No. 1547 of 2004. The appellant has been arraigned as accused in the offence registered at C.R.No.6 of 2003 for the alleged commission of the offences under Sec.120-B, 121-A, 121, 122, 123 of IPC and also under Sec.3(1)-a, b, 3(3), 4, 20, 21(2)b, 22(3) a, b of the Prevention of Terrorism Act, 2002 (for short, 'POTA') and under Sec.25(1)b, c and 27 and 29 of the Arms Act by the police of DCB, Crime, Ahmedabad City.

As per the allegation that has been alleged against the appellant, he is one of the conspirators of the conspiracy which was hatched amongst other accused as well as the present appellant to strike terror in the Hindu community to take vengeance for the damage suffered by the members of the Muslim community and in furtherance of that conspiracy, he was to be sent to Pakistan for training, but he had withdrawn himself. However, during the investigation at the instance of the appellant, several arms, i.e. one foreign made pistol and two country made pistols along with some ammunition were discovered under the provisions of Sec.27 of the Evidence Act. It appears that the investigating agency has recorded several statements of the witnesses as also the confessional statements of some of the accused of this case and the statements of the co-accused revealed his involvement. One independent witness, namely, Mohammed Samim also speaks about the dealing in arms with him by the present appellant. Broadly speaking, these are the allegations and the material against the present appellant.

His application for bail filed before the designated Court has been rejected and against it, this appeal is preferred.

Mr.Ansari learned Advocate appearing with Mr.Alvi, for the appellant submitted before us that it is very strange that the investigating agency has adopted the policy of pick and choose because the present appellant, on the same material, has been cited as a witness in the case of killing of Shri Haren Pandya, former Home Minister of the Gujarat State and he was also involved in two cases i.e. CR No.7 of 2003 and CR No.2 of 2003 given to be known as Tiffin Bomb cases, but he

has been discharged by the competent Court from those cases. In spite of this, on the same material, he has been arraigned as accused in this case. He, therefore, submits that even at this stage, there are reasonable grounds for the Court to believe that he is not involved in the case under the provisions of POTA.

2. This application has been vehemently opposed by the State. Mr.Arun Oza, learned Public Prosecutor appearing for the State has submitted that the submission of Mr.Ansari, learned Advocate for the appellant is not true to the extent when he states that there is a common conspiracy and common material against all the accused. In his submission, the conspiracy of the accused are different and the role that is alleged to have been played by the appellant in all cases is different. In the present case, according to Mr.Oza, the appellant has been found not only to possess illicit weapons but the statements of the co-accused even suggest that at one point of time, as a part of conspiracy, he was to be sent to Pakistan for taking training in terrorist activities, but later on, he had withdrawn for his personal reasons. Mr.Oza also submitted that so far the case put forth, Mr.Ansari has never argued it before the designated Court and it did not have any chance to deal with this aspect. He, therefore, submits that in the present case, there are grounds to believe even prima facie that the appellant is responsible for committing the offences which are made punishable under the provisions of POTA and therefore, he cannot be released on bail and this appeal deserves to be dismissed.

3. We have carefully gone through the record of the application. We have also perused certain material that was produced before us by both the sides including the statement of the appellant recorded in the case of killing of Shri Haren Pandya. We have also considered the submissions advanced before us by the learned Counsel for the parties. It is an admitted position that so far the present appellant is concerned, he has been cited as a witness in the case of killing of Shri Haren Pandya. We have perused that statement. From the statement, it is revealed that at the instance of one Sohail Khan, he had purchased weapons from one Shamirn Rajput. Incidentally, in the present case also, the statement of Shamirn Rajput is recorded by the investigating agency and it is relied on particularly against the appellant. From the said statement it appears that like the present appellant, this witness was also dealing in arms and he had withdrawn for his personal reason from visiting Pakistan. So far the Tiffin Bomb cases are concerned,

the material has not been placed before us. Therefore, we are not in a position to appreciate the submission based on that. However, it clearly appears that the submissions which have been advanced by Mr.Ansari are raised for the first time before this Court, since no discussion about them is to be found in the order of the learned designated Court. The said fact is also not seriously disputed by Mr.Ansari. In that view of the matter, we have no benefit of having a comprehensive view of the facts of this case which have been referred to above and the role played by the present appellant in other cases. We are also deprived of the benefit of the views of the designated Court on this aspect of the case. However, if this is so, it is really necessary that these submissions are required to be carefully considered at all levels. If the submissions of Mr.Ansari is accepted, in our opinion, the appellant may deserve bail. However, we are not expressing any definite view on the said issue since in our opinion, the issue can be thrashed out before the designated Court which is seized off all other cases under the provisions of POTA. It is always better to have a considered discussion and view of the trial Court while dealing with all these cases so as to help us to reach a particular conclusion. In these circumstances, we are of the opinion that the present order is required to be quashed.

4. In view of the aforesaid, we quash the impugned order dated 24th June 2004 and direct the appellant to submit a fresh bail application before the designated Court, if the appellant so desires, within a period of three weeks from the date of this order. He shall be permitted to raise all the submissions which have been raised before this Court before the designated Court. Thereafter within three weeks from the date of filing of such application, the designated Court shall give its judgment and order after taking into consideration the submissions that may be advanced before it including the submissions which have been raised before us for the first time.

With the aforesaid directions, the impugned order dated 24th June 2004 is quashed and set aside and the matter is remanded to the trial Court. The appeal stands allowed to the aforesaid extent.

(Kshitij R.Vyas, J.)

Sreeram. (Akshay H.Mehta, J.)